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PRESUMPTIONS AND THE LAW OF EVIDENCE.

IF the nature and the place in our law of what are called "presumptions" could be truly and exactly stated, it would contribute greatly to clearness in legal thinking; and especially it would help to a right apprehension of our law of evidence. When a learned Italian began a treatise upon Presumptions three hundred years ago, he opened with these words: "*Materia quam aggressuri sumus valde utilis est et quotidiana in practica; sed confusa, inextricabilis fere.*" And these words of Alciatus were put by Mr. Best, in 1844, upon the title-page of his early treatise on Presumptions. Without entering now upon any detailed consideration of the mass of legal presumptions, a herculean task and an unprofitable one, it may be possible to point out what I have just spoken of as the nature and the place of this topic in our law.[1]

[1] The best consideration of the subject of presumptions which is known to me is found in an article in 6 Law Mag. 348 (Oct., 1831). The author dismisses from the subject of evidence what are called "presumptions of fact," and also absolute "presumptions of law;" but, erroneously, as I think, he regards disputable presumptions of law as a very important part of the law of evidence. J. F. Stephen, now Mr. Justice Stephen, long ago (in 1876) remarked of presumptions, that they appeared to him "to belong to different branches of the substantive law, and to be unintelligible, except in connection with them." (Introduction to Digest of Evidence, p. xv, Chase's ed.) He had said something similar in his Introduction to the Indian Evidence Act, in 1872. But he still retained in his books on evidence a number of presumptions, and he gave in Article One of his Digest this definition of the term: "'A presumption' means a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved." He

I. Let us define the relation of presumptions to what we call the "law of evidence." They are ordinarily regarded as belonging peculiarly to that part of the law. This appears to be an error; they belong rather to the much larger topic of legal reasoning in its application to particular subjects; and this is indicated in the last clause of the passage from Alciatus just referred to, when he goes on to say, "*communisque est et jurisconsultoribus et rhetoribus in genere judiciali.*" This discrimination between reasoning and "evidence," as this word is used when we speak of "the law of evidence," is often overlooked,[1] but it is of great importance. There is no law for reasoning other than what is found in the "laws of thought;" but we do have, in our inherited system of municipal law, what is peculiar to English-speaking people, — a law of evidence. In its main features it is unknown upon the continent of Europe; it developed in England because they had the jury in England, or rather because in England they did not give up the jury. On the Continent they had the jury seven and eight hundred years ago, but they lost it.[2]

Now, what is our law of evidence? It is a set of rules which has to do with judicial investigations into questions of fact, and, for the most part, with investigations where there is a dispute. These rules relate to the mode of ascertaining an unknown, and generally a disputed, matter of fact, in courts of justice. But they do not regulate the process of reasoning and argument. This

allowed a place in the law of evidence to "those [presumptions] which relate to facts merely as facts, and apart from the particular rights which they constitute." He seems to me, here and elsewhere, to have left the subject still in confusion, by not discriminating between rules of reasoning and the law of evidence. The law has no mandamus to the logical faculty; it does not direct an inference. That expression, however, is a very familiar one; see *e. g.*, Best, Ev., s. 304.

[1] As by Greenleaf in the opening sentence of his valuable treatise: "The word 'evidence,' in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." This is corrected by Taylor in the first sentence of his book, thus: "The word 'evidence,' considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation."

[2] And so Sir Henry Maine: "Mr. Maine said that the English law of evidence would probably never have come into existence but for one peculiarity of the English judicial administration, — the separation of the judge of law from the judge of fact, of the judge from the jury. Proceedings of the [Indian] Legislative Council of 12th December, 1868." I find this remark in Field's Law of Evidence in British India, p. 23, note. Maine was the predecessor of Stephen as legal member of the Legislative Council, and endeavored, unsuccessfully, to carry through an evidence act.

may go on after all the "evidence" is in, or when all the facts are admitted except such as are deducible by reasoning from these admitted facts. This process is in its nature the same which goes forward on questions of law upon a demurrer, — mere reasoning. But when one offers "evidence," in the sense of the word which is now under consideration, he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact; as when I offer the testimony of A. to prove the fact in issue, — for even direct testimony, to be believed or disbelieved, according as we trust the witness, is but a basis of inference, — or to prove an evidential fact from which, by a process of reasoning, the fact in issue may be made out; and as when I present to the senses of the tribunal a visible object which may furnish a ground of inference. In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence.[1]

Evidence, then, is any matter of fact which is furnished to a legal tribunal otherwise than by reasoning, as the basis of inference in ascertaining some other matter of fact. And the law of evidence is the law which has to do with the furnishing of this matter of fact. But how "has to do"? (1) It prescribes the manner of presenting evidence; as by requiring that it shall be given in open court by one who personally knows the thing to be true, appearing in person, subject to cross-examination; or allowing it to be given by deposition, taken in such and such a way; and the like; (2) it fixes the qualifications and the privilege of witnesses, and the mode of examining them; (3) and chiefly,

[1] Stephen's limitation of the term "evidence" to (1) the statements of witnesses and (2) documents, seems too narrow. When in a controversy between a tailor and his customer, involving the fit of a coat, the customer puts on the coat and wears it during the trial; as in Brown *v.* Foster, 113 Mass., at p. 137, a basis of inference is supplied otherwise than by reasoning or by statements, whether oral or written; and it seems impossible to deny to this the name of "evidence." It is what Bentham called "real evidence," — a valuable discrimination when it is limited to that which is presented directly to the senses *of the tribunal.* But it appears to have little legal importance, when divided further into "reported real evidence," etc. Best, in his treatise, has confused this topic by following Bentham into this sort of refinement, overlooking, probably, for the moment, the fact that Bentham, unlike himself, was engaged in a general philosophical discussion, and was not writing a law book.

it determines, as among probative matters, — that is to say, as among things which are logically and in their nature evidential, — what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence.

Let me at this point speak of one or two fundamental conceptions. There is one precept to be mentioned, which is not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical systems; viz., that nothing which is not supposed to be relevant, *i. e.*, logically probative, shall be received. How are we to know what these things are? Not by any rule of the law. The law furnishes no test of relevancy. For this, it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers; just as a vast multitude of other things are assumed as already sufficiently known.

And there is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence; viz., that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presupposition in a rational system of evidence; and, accordingly, there are very many exceptions to it. But yet, in order to a clear conception of the law, it is important to notice this also as being a fundamental proposition. In a historical sense it has not been the fundamental rule to which the different exclusions were exceptions. What has, as matter of actual fact, taken place is the exclusion by the judges of one and another thing from time to time; and so, gradually, the recognition of this exclusion under a rule. These rules of exclusion have had their exceptions; and so the law has come into the shape of a set of primary rules of exclusion; and then a set of exceptions to these rules. As, *e. g.*, in the case of hearsay, the affirmative rule is that which excludes hearsay;[1] and it is laid down that this applies in a new case, unless it can be brought within an admitted exception.

[1] And so Lord Blackburn, at the end of his opinion in the important case of Sturlaw, Freccia, 5 App. Cases, 623: "I base my judgment on this, that no case has gone so far as to say that such a document could be received; and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible." The point that is made in the text would lead rather to giving scope to what we call the exceptions to hearsay and restricting the rule of exclusion.

And yet, while this is historically true, the main propositions which I have stated should, in the order of thought, be first laid down and always kept in mind. If the doing of this shall require a restatement of some material parts of the law of evidence, that, perhaps, will only turn out as it should.

In stating thus our two fundamental conceptions, we must not fall into the error of supposing that relevancy, logical connection, real or supposed, is the only test of admissibility; for so we should drop out of sight the chief part of the law of evidence. When we have said (1) that, without any exception, nothing which is not supposed to be logically relevant is admissible; and (2) that, subject to many exceptions and qualifications, whatever is logically relevant is admissible, it is obvious that, in reality, there is another test of admissibility than logical relevancy. Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others, as being dangerous, and likely to be misused or overestimated by a jury; others, as being impolitic, *e.g.*, unsafe for the State; others, on the bare ground of precedent. It is this sort of thing, as I said before, — the rejection of what is really probative, on one or another practical ground, — which is the characteristic thing in the law of evidence, marking, as it does, the influence of the jury system which gave rise to it.[1]

[1] It is here that Mr. Justice Stephen's treatment of the law of evidence is perplexing; indeed, it comes to have the aspect of a *tour de force*. Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter, and by the undertaking to put the rules of evidence merely in terms of relevancy. (It is to be observed that by relevancy he always means logical relevancy; the common but uninstructive distinction between legal and logical relevancy is not made by him.) But it is impossible thus to take the kingdom of heaven by storm; one who would state the law of evidence truly must allow himself to grow intimately acquainted with the working of the jury system and its long history. In the Introduction to the Digest of Evidence (Chase's edition) xi-xii, the author says: "The great bulk of the law of evidence consists of negative rules declaring what, as the expression runs, is not evidence. The doctrine that all facts in issue, and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of, and gives unity to, all these express negative rules. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to a system, until it occurred to me to ask the question, 'What is this evidence which you tell me hearsay is not?' The expression 'hearsay is not evidence' seemed to assume that I knew, by the light of nature, what evidence was; but I perceived at last that that was just what I did not know. I found that I was in a position of a person who, having never seen a cat, is instructed about them in this fashion: 'Lions are not cats in one sense of the word, nor are tigers nor leopards, though you might be inclined to think they were.' Show me a cat, to begin with, and I at once understand what is meant by saying that the lion is not a cat, and why it is possible

The law of evidence is the creature of experience rather than logic, and we cannot escape the necessity of tracing that experience. Founded, as being a rational system, upon the laws that

to call him one. Tell me what evidence is, and I shall be able to understand why you say this and that class of facts are not evidence. The question, 'What is evidence?' gradually disclosed the ambiguity of the word. To describe a matter of fact as 'evidence' in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What then does the word mean? The only possible answer is: it means that the one fact either is, or else is not, considered by the person using the expression to furnish a premise or part of a premise from which the existence of the other is a necessary or probable inference,— in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that judicial evidence is only one case of the general problem of science, namely, inferring the unknown from the known. As far as the logical theory of the matter is concerned, this is an ultimate answer. The logical theory was cleared up by Mr. Mill. Bentham and some other writers had more or less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my 'Introduction to the Indian Evidence Act' to point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law. The law has been worked out by degrees by many generations of judges who perceived, more or less distinctly, the principles upon which it ought to be founded. The rules established by them no doubt treat as relevant some facts, which cannot be said to be so. More frequently they treat as irrelevant, facts which are really relevant; but, exceptions excepted, all their rules are reducible to the principle that facts in issue, or relevant to the issue, and no others, may be proved."

It is singular that Stephen should have chosen as a basis for careful discriminations so loose a catch as this, that "hearsay is not evidence." Of course it often is evidence, in the sense of being logically relevant; what is meant is, that it is not legally admissible. If the phrase "hearsay is not evidence" is to be used in serious discussion, the term "evidence" must have the purely special sense of that sort of evidence which is legally receivable by the courts. The true statement is, that while hearsay may be evidence, it is not admissible evidence; it is a kind of evidence which is rejected. When the writer says that "the doctrine that all facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of, and gives unity to, all these express negative rules," viz., rules "declaring what, as the expression runs, is not evidence,"— does he not overlook the fact that there is no exception whatever to the proposition that "no others may be proved"? and that, since the only exceptions are those to the rule that all relevant facts may be proved, it necessarily appears that matter is rejected on other tests than relevancy? Certainly the twofold doctrine which is named does not "form the centre of, and give unity to, all these express negative rules," in the sense of supplying the test by which they are applied. Something else has to be taken account of; namely, the many practical considerations which the jury system brought vividly home to the judges, as they shaped our rules of evidence in the daily administration of it. When the writer says that he is assumed to know what "evidence" is, he states what is true enough. That is to say, the law does take it for granted that people know how to find out what is and what is not logically probative.

In criticising Stephen's views thus freely I would not seem wanting in respect to a writer who has laid all careful students of evidence under an obligation. No one can reflect deeply on that subject without coming often upon this courageous thinker. He has gone deeper into it than any of our authors.

govern human thought, and so presupposing and conforming to these, it yet recognizes another influence that must, at every moment, be taken into account; for it is this which has brought it into being, as it is the absence of this which alone accounts for the non-existence of these rules in all other countries, ancient or modern. For, as I have already indicated, the main errand of the law of evidence is to determine not so much what is admissible in proof, as what is inadmissible. Assuming, as it does, that, in general, what is evidential is receivable, it is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of admissible evidence. Admissibility is determined, first, by relevancy, — an affair of logic and not of law; second, but only indirectly, by the law of evidence which, in strictness, only declares whether matter which is logically probative is excluded.

Is it then really so, that this great multitude of decisions that emerge day by day, holding that such and such evidence is or is not admissible, have so little to do with the law of evidence? Yes. The greater part of them are ultimately reducible to mere decisions of a question of logic as applied to a point of substantive law or pleading. When a man mistakes his proposition of substantive law and seeks to put in evidence to sustain his erroneous view, he is daily told that his evidence is not admissible, — when the thing that is meant is, you are wrong in a point of the law of damages;[1] or you are proceeding upon a wrong conception of the standard of diligence to which your adversary had to conform;[2] or you have a wrong notion of the meaning and contents of the general issue in pleading,[3] or of what is put in controversy by a plea of payment. In such cases a determination that what is offered in evidence is or is not receivable, means, (1) you are wrong in your proposition of substantive law; (2) having regard to the true proposition, your "evidence" (*i.e.*, what you offer as evidence) is logically irrelevant. All such determinations as these, of which there is a vast forest in our books, while they certainly relate to evidence and involve questions of law, involve no point at all in the law of evidence.[4]

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[1] Hart *v.* Pa. R.R. Co., 112 U. S., at p. 343.

[2] Grand Trunk Ry. Co. *v.* Richardson, 91 U. S., at p. 469.

[3] Marine Ins. Co. *v.* Hodgson, 6 Cranch, at p. 219; Young *v.* Black, 7 ib., at p. 567.

[4] See Mr. Justice Holmes' excellent observations in his Common Law, 120-129.

II. But now it is necessary to take notice of a thing which easily escapes attention ; namely, that much of the substantive law is expressed presumptively, in the form of *prima facie* rules. This evidential form of statement leads often to the opinion that the substance of the proposition also is evidential, and then to the further notion, that inasmuch as it is evidential it belongs to the law of evidence. That is an error. In a reasoned body of law like ours, much of it comes about by "intendments." In applying statutory law also, this takes place, but far less conspicuously than in the common law. If we suppose any fundamental proposition of the substantive law, *e.g.*, that when, in negotiating for a sale of specific personal property, the event X happens, with the intention of both parties to sell the property, the sale actually takes place, we observe that this comes to be attended by a crop of subsidiary rules, such as that when Y happens, this necessary intention of the parties presumably exists.[1] The question of intention is not closed to evidence by this rule, — the matter lies wholly open ; but, in applying the law, a certain *prima facie* effect is given to particular facts, and it is not merely given to them once, by one judge on a single occasion, but it is imputed to them habitually, and by a rule which is followed by all judges, and recommended to juries, and even laid down to juries as the binding rule of law. Accordingly the substantive law gets into this shape, that when, in a negotiation for a sale of specific personal property, X happens, with the intention on both sides to sell the property, the sale takes place then ; and when Y happens, this intention presumably exists. Or, to put it shorter, "when X and Y happen in a negotiation for a sale of specific personal property, presumably the sale takes place." Blackburn, in stating these rules, calls them rules of "construction ;" that is to say, rules of the substantive law designed to aid in interpreting the words and conduct of men.[2]

In such cases, that which is evidential merely, — that is to say,

[1] Blackburn, in his admirable book on Sale, 1st ed., pp. 151–154, gives two such rules, "of which there is no trace in the reports before the time of Lord Ellenborough" (A D. 1802–1818).

[2] "A rule of construction may always be reduced to the following form : certain words and expressions which may mean either X or Y shall *prima facie* be taken to mean X. A rule of construction always contains the saving clause: 'unless a contrary intention appear' . . . though some rules are much stronger than others and require a greater force of intention in the context to control them." Hawkins, Wills, preface.

the foundation of a logical inference as to the existence of one of those ultimate facts to which alone, in the first instance, the substantive law annexes its consequences,—has itself become the subject of a rule of substantive law, and comes to have certain consequences directly annexed to it. They are annexed to it originally, because it is in some degree evidential of the ultimate fact; while the having of a rule about it at all is rested on grounds of policy. The courts have, perhaps, seemed to themselves to abstain from legislation, and to be keeping within the region of mere administration of the existing law, by the expedient of making the rule a *prima facie* one. And yet it is clear that this is true legislation. One may occasionally trace it until it ripens into open and confessed legislation, as in Dalton *v.* Angus.[1] To say, as is sometimes done, that in such cases there is "a rule of law that courts and judges shall draw a particular inference," [2] is, perhaps, intended as a mere mode of expression; but it is misleading, as involving the misconception that the law of evidence has any rules at all for conducting the logical process. It would be accurate to say that the rule of law requires a judge to stop short in the process of drawing inferences, or not to enter upon it at all; to assume for the time that one fact is, in legal effect, the same as a certain other. The rule fixes the legal effect of a fact, its legal equivalence with another. And it makes no difference in the essential nature of the rule whether this effect is fixed absolutely or *prima facie*: it gives a legal definition. Such is the nature of all rules to determine the legal effect of facts as contrasted with their logical effect. To prescribe a certain legal equivalence of facts, is a very different thing from merely allowing that meaning to be given to them. A rule of presumption does not merely say such and such a thing is a permissible and usual inference from other facts, but it goes on to say that this significance shall always, in the absence of other circumstances, be imputed to them,—sometimes passing first through the stage of saying that it *ought to be* imputed.

I have already said that the nature of these rules is brought out when they ripen from being a mere *prima facie* doctrine into an absolute and incontrovertible one. The familiar doctrine about prescription used to be put as an ordinary rule of presumption; in twenty years there arose a *prima facie* case of a lost grant or of

[1] 6 App. Cas. 740; 2 Greenl. Ev., s. 539.

[2] Stephen, Dig. Ev., art. 1, defining "Presumption."

some other legal origin. The judges at first laid down that, if unanswered, twenty years of adverse possession justified the inference; then that it "required the inference," *i. e.*, it was the jury's duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and at last this conclusion was laid down as a rule of the law of property to be applied absolutely.[1] It is evident, upon reflection, that the rule was always a rule of property, after it ceased to be a mere statement of a permissible inference; of a mere logical fact, viz., that this was generally a right and wise conclusion. When the judges advised the jury, and afterwards directed them as a matter of legal duty to find a lost grant under the circumstances indicated in the rule, they were indeed dealing with evidential, secondary facts, and they adopted the phraseology of reasoning and drawing inferences. But in reality they were laying down a rule of policy[2] which they themselves had determined to apply, and which they advised and directed their associates in administration, the jury,— their coördinate, and, in a degree, their subordinate associates,— also to apply; a rule which made the twenty years' open and uncontradicted adverse possession a bar. Such advice and such direction is natural and desirable when a presiding learned tribunal is instructing an unlearned one, whose action it has the right to revise; for the administration of the law should be kept consistent. In such cases the judges accomplish, through the phraseology and under the garb of "evidence," the same results that they have long reached, and are now constantly reaching, by the directer means of estoppel. The modern extensions of this doctrine broaden the law by a direct application of maxims of justice,[3] — a simple method, and worthy of any judicial tribunal which rises to the level of its great office; and yet one not quite

[1] Dalton *v.* Angus, 6 App. Cas. 740; Wallace *v.* Fletcher, 30 N. H. 434; 3 Gray's Cases on Property, 127 *et seq.*

[2] See Ld. Blackburn in Dalton *v.* Angus, 6 App. Cas. 808 *et seq.*

[3] It is such things to which Mr. Justice Erle refers in a fine passage where he speaks of Lord Mansfield as "tracing the law upon the question [of copyright in Miller *v.* Taylor] to its source in the just and useful. And Lord Mansfield's authority in this matter outweighs that of Lords Kenyon and Ellenborough, not only . . . , but also because these successors of Lord Mansfield appear to me to have turned away from that source of the law to which he habitually resorted with endless benefit to his country." Jefferys *v.* Boosey, 4 H. L. C., at p. 876. See also Mr. James C. Carter's powerful address on "The Provinces of the Written and the Unwritten Law." New York: Banks & Brothers, 1889.

in harmony with the general attitude of our common-law courts and their humble phraseology in professing to abdicate the office of legislation. But inasmuch as every body of men who undertake to administer the law must, in fitting it to the ever-changing combinations of fact that come before them, constantly legislate, incidentally and in a subsidiary way, it is best that this should be openly done; as it really is in the cautious extensions of the principle of estoppel. The same thing has taken place by presumptions, only it was more disguised. By merely handling "evidence," and fixing upon it a given quality, the judges' denial of any right to make the law seemed to moult no feather.

Let me trace the same process in two more instances. (*a*) The rule of presumption is that a person shall, in the absence of evidence to the contrary, be taken to be dead, when he has been absent for seven years and not heard from by those who would naturally have heard, if he had been alive. This is a modern rule. It is not at all modern to infer death from a long absence; the recent thing is the fixing of a time of seven years, and putting this into a rule. The faint beginning of it as a common-law rule, and one of general application in all questions of life and death, is found, so far as our recorded cases show, in Doe d. George *v.* Jesson[1] (January, 1805). Long before this time, in 1604, the "Bigamy Act" of James I.[2] had exempted from the scope of its provisions, and so from the situation and punishment of a felon, (1) those persons who had married a second time when the first spouse had been beyond the seas for seven years,[3] and (2) those whose spouse had been absent for seven years, although not beyond the seas,— "the one of them not knowing the other to be living within that time." This statute did not treat matters altogether as if the absent party were dead; it did not validate the second marriage in either case. It simply exempted a party from the statutory penalty. Again, in 1667, the statute of 19 Car. II., c. 6,[4]

[1] 6 East, 80. Best Ev., s. 409, note, seems to intimate that this may have been an old thing; but there is no ground for it. He refers to Thorne *v.* Rolff, in Dyer's brief report, where something is said of seven years. But the report in Old Benloe, 86, which gives the record, shows that the time was not seven years.

[2] St. 1 Jac. I., c. 11.

[3] Without saying anything about a knowledge of the absent party's existence; and so construed as making such knowledge immaterial. 1 Hale, P. C. 693.

[4] The ordinary citation. In the "Statutes of the Realm," vol. 5, this statute appears as 18 and 19 Car. II., c. 11.

"for Redresse of Inconveniencies by want of Proofe of the Deceases of Persons beyond the Seas or absenting themselves, upon whose Lives Estates doe depend," had provided, in the case of estates and leases depending upon the life of a person who should go beyond the seas, or otherwise absent himself within the kingdom for seven years, that where the lessor or reversioner should bring an action to recover the estate, the person thus absenting himself should "be accounted as naturally dead," if there should be no "sufficient and evident proof of the life," and that the judge should "direct the jury to give their verdict as if the person . . . were dead." But if the absent party should not really have died provision was made for a subsequent recovery by him. The effect of this statute, then, was to end, in a specific class of cases, all inquiring into evidence, by a certain assumption; or, as it is called, by a presumption. The rule fixes, for the purpose of a particular inquiry, the effect of specified facts; absence for seven years, unheard of, is, as regards this particular inquiry, to be accounted as being the same thing as death; it is its legal equivalent.

Now, subsequently, similar cases may have been brought within "the equity" of the statute, as Chief Justice Holt, in 1692,[1] is reported to have "held that a remainder-man was within the equity of that law; but we hear of no suggestion of a general seven-year rule such as we have now, before 1805.[2] In the case of Doe d. George *v.* Jesson,[3] the Court of King's Bench — on a rule for a new trial, in an action of ejectment, which turned on the question whether the plaintiff's lessor had entered within the time allowed by the Statute of Limitations, which again turned on the time of the death of the lessor's brother, who had gone to sea and had not been heard of for many years — sustained a ruling that the jury must find the time of death as well as they could, . . . that at any time beyond the first seven years they might fairly presume him dead; but the not hearing of him within that period was hardly sufficient to afford that presumption. Lord Ellenborough said: "As to the period when the brother might be supposed to have died, according to the statute, 19 Car. II., c. 6, with respect to leases dependent

[1] Holman *v.* Exton, Carth. 246.

[2] See, for instance, Rowe *v.* Hasland, 1 Wm. Bl. 404 (1762); Dixon *v.* Dixon 3 Bro. C. C. 510 (1792); Lee *v.* Wilcock, 6 Ves. 605 (1802).

[3] 6 East, 80.

upon lives, and also according to the statute of bigamy (1 Jac. I., c 2), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him." This was supporting what the jury had done. All that this case lays down is that the jury were justified, on the analogy of the two statutes, in finding death by the end of the seven years; and, moreover, looking at Mr. Justice Rooke's ruling, which was not questioned upon this point, that they would not be justified in finding it earlier. It was not laid down that they ought to find death at the end of seven years, or that they must; nor was any rule of presumption put forward; nor, as I say, was this the point on which the ruling below was questioned in the full bench.

In 1809, at nisi prius,[1] in an action against a woman on a promissory note, she pleaded coverture, and proved her marriage; but the husband had gone to Jamaica twelve years ago, and the question was as to the way of proving that he was now living. The defendant insisted that he must be presumed to be alive; but Lord Ellenborough ruled that "evidence" must be given of his being alive within seven years. This was given, and the defendant had a verdict. In the other case the aim was to prove death; here, life; and here the ruling was that a court cannot assume life now, when all that it knows is that the party has been absent and unheard from for more than seven years. Upon the basis of these cases, there soon appeared in the text-books on evidence, for the first time, in 1815, a general proposition that "where the issue is upon the life or death . . . where no account can be given of the person, this presumption [viz., that a living person "continues alive until the contrary be proved"] ceases at the end of seven years from the time when he was last known to be living, — a period which has been fixed from analogy to the statute of bigamy and the statute concerning leases determinable upon lives."[2] In this form the matter was again put by Starkie, ten years later, in the first

[1] Hopewell *v.* De Pinna, 2 Camp. 113.

[2] Phil. Ev., i., 152 (2d ed.).

edition of his book ; and by Greenleaf, and so by Taylor.[1] But the judges as well as text-writers got to expressing what had been put as a cessation of a presumption of life in the form of an affirmative presumption of death ; and this was put as a rule of general application wherever life and death were in question. And so Stephen puts it :[2] "A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." This rule is set down by Stephen among the few presumptions which he thinks should find a place in the law of evidence ; his definition of the term "presumption" being, as it will be remembered,[3] "a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved." Stephen published his Digest in 1876. Here, then, in seventy years, we find the rule about a seven years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty, the particular period being fixed by reference to two legislative determinations in specific cases of a like question ; (2) passing into the form of an affirmative "rule of law" requiring that death be assumed under the given circumstances. This is a process of judicial legislation, advancing from a mere recognition of a step in legal reasoning to a declaration of the legal effect of certain facts.

In Pennsylvania it is possible to put the finger on the very case that accomplished this legislative stroke : the case of Burr *v.* Sim, 4 Whart. 150 (1839). In 1817[4] the court had laid down the duty of a jury to presume death, without any positive proof of it, when an unexplained absence for many years is shown ; but they refused to adopt a seven years' rule. "I am not," said Tilghman, C. J., "for fixing any precise period after which a presumption of death rises. But here fourteen years and nine months," etc. In Burr *v.* Sim, however, the court (Gibson, C. J.) adopted the English rule, although in Pennsylvania there were no statutes like those in

[1] Starkie, Ev. (1st ed.), part iv., p. 458; 1 Gr. Ev., s. 41; 1 Tayl. Ev. (8th ed.), s. 200.
[2] Dig. Ev., art. 99.
[3] Dig. Ev., art. 1.
[4] Miller *v.* Beates, 3 S. & R. 490.

England; and they said: "If there is no direct decision, as there is in some of our States, it is because there has been no case requiring it. There is such a case now, and the principle is to be considered as definitely settled." In some States this rule, or the like, has been fixed by statute; but it is no less well established in others where it rests not upon a statute, but a judicial determination.

(*b.*) Again, the nature of such rules, and the way in which they spring up, may be illustrated by a short line of recent cases in England. In considering applications for relief against an alleged interference with ancient lights, the equity courts lay down the test that a new erection must not render the house, as touching these lights, "substantially less enjoyable." That is the legal rule to be applied. But in determining whether this amount of interference exists in any given case, it was thought convenient by V. C. Stuart, in 1866,[1] to lay down an auxiliary rule, a specific, *prima facie* rule, on the analogy of a recent statute for regulating the height of buildings on streets, so as to prevent the darkening of opposite houses. This statute required that no building should be higher than the width of the street, — so as to leave to their opposite neighbors an angle of light of forty-five degrees. Accordingly, on an application for an injunction against continuing a neighboring erection where no question of the street was involved, the Vice-Chancellor adopted and applied this same rule, adding that he had heard from one of the common-law judges that they proposed, in general, to act on that principle. Here was the starting of a rule of practice, — of administration; a rule subsidiary to the general one above given, — a rule of presumption; namely, that in the absence of evidence to the contrary the complainant's property is not substantially less enjoyable when he is left an angle of forty-five degrees of light. This rule had a certain amount of vogue; and it appears to have been creeping into the position of something more than a mere *prima facie* rule. In 1873[2] the Lord Chancellor Selborne denied it this character, while still allowing it the place of a mild *prima facie* rule. "With regard to the forty-five degrees, there is no positive rule of law upon that subject . . . ; but undoubtedly . . . if the legislature, when making general regulations as to buildings, considered . . . , then

[1] Beadel *v.* Perry, L. R. 3 Eq. 465.

[2] City of London Brewery Co. *v.* Tennant, L. R. 9 Ch. 212.

the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *prima facie* evidence that there is not likely to be material injury. . . . If forty-five degrees are left, this is some *prima facie* evidence of the light not being obstructed to such an extent as to call for the interference of the court, — evidence which requires to be rebutted by direct evidence of injury, and not by the mere exhibition of models." But even in this dubious form the suggestion of a rule was afterwards repudiated, and we find the Court of Appeal wholly rejecting it in 1880.[1] "It is no rule of law," said James, L.J., "no rule of evidence, no presumption of law, and no real presumption of evidence except of the very slightest kind." The Lord Justices Brett and Cotton also denied it the quality of a rule to guide either court or jury. Here, then, is an abortive rule of presumption, the beginning of which, and the end, we can easily trace.[2]

The characteristic of all these instances is the same. Matter, logically evidential, has become the subject of a legal rule annexing consequences directly to it; and this rule takes its place in the substantive law as a subsidiary proposition, alongside of the main and fundamental one, as an aid in the application of it. The law, as I have said, is always growing in this way, through judicial determinations; for the application of the ultimate rule of the substantive law has to be made by reasoning; and this process is forever discovering the identity, for legal and practical purposes, of one state of things with some other. Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. Relating, as these declarations do, to specified facts, and groups of facts, and certain aspects and consequences of them, they belong to that part of the substantive law which deals with these particular things; and

[1] Ecce. Com. *v.* Kino, 14 Ch. D. 213; s. c. 28 W. R. 544.

[2] See Mr. Justice Holmes's interesting comments upon the earlier cases in this series; Common Law, 128. They had attracted my attention quite independently, and I now remark for the first time (since this article was put in print) that he had cited them in a similar line of argument. Perhaps this is only an illustration of that suggestion and stimulus for which so many persons are indebted to this excellent book, although they may have forgotten it.

as Stephen truly remarks,[1] they can be understood only in connection with these branches of the law. They do not belong to the law of evidence. When it is said that if persons contract for the sale of a specific chattel, it is presumed that the title passes; and that when a man voluntarily kills another, without any more known or stated, it is presumed to be murder; and that when a written communication to another is put in the mail, — properly addressed, and postage prepaid,— it is presumed that the other receives it; and that when one has been absent seven years and no knowledge of him had by those who would naturally know, death is presumed; in these cases, rightly considered, we have particular precepts in the substantive law of so many different subjects, — of property, of homicide, of notice, and of persons.

Everybody knows that vast sections of our law have accumulated in this way. It is thus, especially, that Lord Mansfield and others silently conspired with the merchants, and transferred their usages into the law. The nature of this process, as I have said, is not affected by the fact that the judges leave their conclusions open to controversy. That is not an unusual form of legislation even on the part of those who profess to be legislating. Look, for instance, at the following bits of professed legislation running through some centuries, — at times attaching absolute consequences to evidential facts, at times operating contingently. (1) In an often-quoted passage from the laws of Ine, King of Wessex (A.D. 688-725), c. 20,[2] it is provided that "if a far-coming man or a stranger journey through a wood out of the highway, and neither shout nor blow his horn, he is to be held for a thief, either to be slain or redeemed."[3] (2) In the laws of Cnut (A.D. 1017–1035)[4] we read that if a man brings home a stolen thing, and it is put into the wife's chest, of which she has the key, "then she is guilty." And (3) the laws of Ine[5] provide that, "if stolen property be attached with a chapman, and he have not bought it before good witnesses, let him

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[1] Dig. Ev., note xxxv.

[2] Thorpe, Ancient Laws and Institutes of England, i., 115.

[3] It is interesting, in view of Stephen's definition of a presumption, to find him (Hist. Com. Law, i., 61) calling this "a presumption of law."

[4] Thorpe, i., 419.

[5] Thorpe, i., 119.

prove . . . . that he was neither privy (to the theft) nor thief; or pay as *wite* (fine) xxxvi shillings." To be found thus in the possession of stolen goods was a serious thing; if they were recently stolen, then was one "taken with the mainour," — a state of things that formerly involved a liability to immediate punishment, without a trial; and, later, to a trial without a formal accusation;[1] and, later still, subjected a man to the operation of a presumption of guilt which, in the absence of contrary evidence, justified a verdict; and at the present time is vanishing away into the mere judicial recognition of a permissible inference of logic, — as in Stephen's "Digest of Criminal Law:" "The inference that an accused person has stolen property or has received it, knowing it to be stolen, may be drawn from the fact that it is found in his possession after being stolen, and that he gives no satisfactory account of the way in which it came into his possession."[2] It is to be remarked, of course, that the old modes of trial — the ordeal, the oath, wager of law, battle — were of a sort which differed radically from our conception of a trial. The difference in a criminal case may be expressed by saying that when a man was charged with an offence, he was punished unless he cleared himself. He was offered a certain test, — the oath or the ordeal, — and if he came out of it well he was cleared; if not, he was punished. With us he is not required to clear himself, but those who arraign him must prove him guilty. If we say, as we do, that now a man regularly charged with crime is presumed innocent, we should correctly intimate the old system by saying that he was presumed to be guilty. And so (4) The Assize of Clarendon (1166) required that a person charged under the oath of twelve men of the hundred and four men from each of certain neighboring townships as an accused or notorious robber [or the like], should be taken

[1] Staundford, Pl. Cr. 179 b.

[2] Art. 308. In a note the learned author adds: "As to the rule as to recent possession of stolen goods, many cases have been decided on the subject . . . ; but they seem to me to come to nothing but this, that every case depends on its own circumstances," etc. Probably the reason of the existence and persistence of the "presumption" to which Stephen here alludes is found in what I have intimated in the text, namely, the long historical root that the thing has. And, indeed, it is found probably in all systems of law. See the opinion of Doe, J., in State *v.* Hodge, 50 N. H. 510. For another instance of this fading away of substantive law, through various stages, into mere evidence, see doctrines as to the crying of the child in tenancy by the curtesy, Bracton, fol. 438, Co. Lit., l. 1, c. 4, s. 35; and compare Plac. Abb. 267, col. 2 (Hil. 5 Ed. I., A.D. 1276–7), with Paine's Case, 8 Co. 34, 35; 2 Blackst. Com. 127. See *infra*, p. 162, n. 2.

and put to the ordeal of water.[1] (5) By Stat. 25 Jac. I., c. 27,[2] it is enacted that "Whereas . . . Women . . . delivered of Bastard Children . . . secretly bury or conceal the Death of their Children and . . . if the Child be found dead . . . alledge that the said Child was born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said Child . . . were murthered by the said Women . . . be it enacted . . . that if any Woman . . . be delivered of any issue of her Body . . . a Bastard, and . . . endeavour privately . . . so to conceal the Death thereof, as that it may not come to Light whether it were born alive or not, but be concealed . . . the said Mother . . . shall suffer Death as in Case of Murther, except such Mother can make Proof by one Witness at the least that the Child . . . was born dead." (6) The Puritans of Plymouth, in 1671,[3] "Ordered, That the Accusation, Defamation, or Testimony of any Indian or other probable circumstance, shall be accounted sufficient conviction of any English person or persons suspected to Sell, Trade or Procure any Wine, Cyder, or Liquors as abovesaid, to any Indian or Indians, unless such English shall upon their oath clear themselves from any such act of direct or indirect Selling, Trucking, or Lending of Wine, Cyder or Liquors to any such Indian or Indians, and the same counted to be taken for conviction of any that Trade any Arms or Amunition to the Indians." The difficulty in such cases was, that while the matter was very pressing, yet they could not swear an unconverted Indian, according to the ideas of that period; they seem to have reckoned the Indians' god to be the devil. And the only way to handle such cases as

[1] Stubbs (Select Charters) seems to misconceive the significance of this when he says: "The ordeal in these circumstances being a resource following the verdict of a jury acquainted with the fact could only be applied to those who were to all intents and purposes proved to be guilty." The ordeal was strictly a mode of trial. What may clearly bring this home to one of the present day is the well-known fact that it gave place, not long after the Assize of Clarendon, to the petit jury, when Henry III. bowed to the decree of the fourth Lateran Council (1215), abolishing the ordeal. It was at this point that our cumbrous, inherited system of two juries in criminal cases had its origin. For the decree of the Council see Sacrosancta Concilia, xiii. c. 18, pp. 954, 955 (Venice, 1730); and for Henry's writ of January 6, 1219, to certain itinerant justices, with instructions what they were to do now that they had lost the old mode of trial, see 1 Rymer's Fœdera (Rec. Com. ed.), 154; (old ed.) 228. And see Pike's Hist. Crime, i. 467; Palgrave's Eng. Com., i. 266; Maitland, Pleas of the Crown for Gloucester, xxxviii.

[2] A.D. 1623; modelled, apparently, on an edict of Henry II., of France, in 1556, Recueil des Anciennes Lois Françaises, xiii. 472-3.

[3] Plymouth Colony Laws, 290, 7.

they mentioned in this law — cases of very imperative urgency — was to let the accusation put the accused to his oath. A similar requirement was made in cases of usury in the Mass. Stat. of 1783, c. 55, referred to by Chief Justice Shaw as "trial by oath," in Little *v.* Rogers, 1 Met. 108: "It seems proper to remark that trial by jury has been substituted for the old trial by oath under St. 1783, c. 55." (7) And, finally, we read in the Gen. Stat. of Vermont, c. 28, s. 78,[1] a common enough provision nowadays, that whenever an "injury is done to a building or other property by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury, unless they shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury." These are instances of confessed legislation. How do they differ from the rules of presumption established by the judges? Is it not true that neither the one nor the other belongs to the subject of evidence?

III. It may be suggested that there is, after all, a very grave difference between these two classes of things, the Legislature's enacted rule of presumption and the merely judicial rule, — a difference which would be tested by supposing a special verdict that found nothing but the facts named in the rule. It was held long ago[2] that "request and refusal to deliver [in trover] is good evidence to prove conversion; but if it be found specially it shall not be adjudged conversion." And yet the judges said that upon demand and refusal, conversion will be presumed.[3] So in Isaack *v.* Clarke,[4] Coke, C. J., declared that where a deed of feoffment forty years old is given in evidence at the assizes, and it appears that possession has always gone with it, although livery cannot be proved, he should direct the jury to find it, "for it will be intended; yet if the jury should find these facts specially, we cannot adjudge it a good feoffment, for want of livery." And

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[1] Cited in 91 U. S., at p. 456.

[2] Agars *v.* Lisle, Hutton, 10. And see Ames' Cases on Torts, 391 *et seq.*

[3] Coke, C. J., in Isaack *v.* Clarke, 1 Rolle, at p. 131 (1615). In the early cases of Eason *v.* Newman, Cro. El. 495; s. c. Moore, 460 (1595), it was held the other way. In the great case of Isaack *v.* Clarke, the court was equally divided on it; and in Baldwin *v.* Cole, 6 Mod. 212 (1704), Holt, C. J., said: "The very denial of goods to him that hath a right to demand them is an actual conversion, and not only evidence of it, as has been holden."

[4] 1 Rolle, at p. 132.

again, Brett, L. J., in Angus *v.* Dalton,[1] said of the doctrine of prescription and a lost grant that "none of them [certain judges] meant to say that a special verdict would have been good which did not in terms find the existence of a grant;" although there is no doubt that, according to the view of those judges, a lost grant was presumed in the sort of case which was then under consideration by a very emphatic rule. And so, it may be suggested, is it with judicial rules of presumption generally. By this test their character, as being rules of evidence, and as not being rules of substantive law, may be thought to be fixed; while, as regards legislative enactments of such rules, their quality, as being the contrary, may seem to be shown by the same test.

Now, as to this: (1.) There is no doubt that a statute which attaches legal consequences to facts, although these facts are rather, in their nature, evidential of an objectional something than the thing itself, must be enforced upon courts and juries alike; and it may be added that such legislation is sometimes adopted for the very purpose of compelling juries to recognize the rule which courts lay down, as in the case of the Statute of Stabbing in 1604,[2] upon which the judges in 1666 "were all of Opinion that the Statute . . . was only a Declaration of the Common Law, and made to prevent the inconveniences of Juries, who were apt to believe that to be a Provocation to extenuate a Murder which in Law was not."[3]

(2.) And again there is no doubt that, as regards all that class of "presumptions," so called, which are mere judicial recognitions of what is probable, or what is permissible in reasoning, or what a court will recognize as sufficient to support a verdict,—these have no quality of substantive law, although one may need to know the substantive law in order to understand their application.

(3.) As regards cases where there is really a judicial rule of presumption,—that is to say, a rule which the judges themselves announce and follow, and lay down to juries as expressing something more than an accurate conclusion of reasoning,—the judges should give effect to it in construing a special verdict; that is to say, where a jury finds the facts, which, according to the rule as thus adopted by the judges in their own administration of the law, and

[1] Q. B. D., at p. 201.

[2] Jac. I., c. 8.

[3] Lord Morley's Case, Kelyng (old ed.), 55.

laid down for the jury, are stamped with a certain quality, the court should read a special verdict which conformed in its findings to the terms of the rule, as a finding of ultimate facts. Such was the sensible intimation of Doderidge, J., in his opinion in Isaack *v.* Clarke, that there is no sense in the judges' telling the jurors that they ought on their consciences to find a demand and refusal to be a conversion, and yet themselves on their consciences adjudging otherwise.[1] But, of course, it must be carefully observed, that, in order to enable a court in dealing with a special verdict to give effect to a rule of presumption, there must be a finding of *everthing* which the rule takes for granted. There must not remain any necessity of weighing the evidence, to see whether all the suppositions of the rule exist or not. It would not do, for example, to expect a court to discover the fact of death, in a special verdict, which stated that A had been absent seven years, without being heard from by those who would naturally have heard of him if he were alive, unless the verdict should also in some way negative the existence of other evidence to show life. For this is the rule,— that a presumption of death arises in the absence of such countervailing evidence. And so as regards demand and refusal in trover; these alone are not enough, without negativing the existence of any counter-evidence. But if we assume such a full finding, what reason and what authority is there for saying that a court may not apply to the finding of the jury any "presumption" which may fairly be called a rule of law?[2] The true doctrine in such a case was expressed by one of our ablest judges, Mr. Justice Thornton, of California,[3] in passing upon just such a question as the one in hand, when he said, speaking for the court, "We must read all facts, whether in a pleading of a special verdict, or an agreed statement or finding of facts, in the light of rules of law. Presumptions of law [he was there applying the principle of assuming the continuance of a thing

[1] 1 Rolle, at p. 131. N'est reson que nous dirromus al jurors que ils sur lour consciences doint trover ceo destre un conversion et tamen nous adjudgeromus auterment sur nostre consciences demesne.

[2] Observe what happened in dealing with the special verdict in Tindal *v.* Brown, 1 T. R., p. 171, note, when the judges were giving precision to the doctrine of reasonable notice to an indorser. See explanations of this case by Lawrence J., in Darbishire *v.* Parker, 6 East, 3, and by Shaw, C. J., in Wyman *v.* Adams, 12 Cush. 210. And notice also the special verdict in Paine's Case, 8 Co. 34, when an old rule was fading out; the jury found that S. "had issue which was heard cry and died." See *ante* p. 158, n. 2.

[3] Kidder *v.* Stevens, 60 Cal., p. 419.

once proved to exist] are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable. . . . In other words, a presumption of law that is disputable, when not changed by evidence, becomes to the court a rule indisputable for the case, and the court is bound to apply it." And it must be remarked that always, in determining the contents of a special verdict, the court must go through the process of interpretation,— sometimes an easy one, sometimes admitting of question. These verdicts, of course, are to be read in connection with the whole record, and as expressing — in addition, perhaps, to much else — the ultimate facts. But they are construed more indulgently than pleadings, being "the words of laymen;" and it is not fatal that they be argumentative, so that they "find the Case in Fact clear and without Equivocation, to common intent."[1] In construing them, all the appropriate considerations of sense and logic, as well as the rules of law, will be taken into account. How far this process of construction may carry a court is indicated in Plummer's case, on an indictment for murder, in 1701,[2] when the verdict stated that one of the defendant's associates in a certain illegal enterprise "did shoot off the Fuzee, and thereby did kill the said," etc. The court said that it was hard to construe a special verdict so as to make this an involuntary shooting; in an indictment its being voluntary must be alleged, but not in a special verdict. "The saying he did it must be understood to be with and not against his will; for where any one upon any killing of a man is to be discharged by an involuntary killing, it must be so found; . . . for a man being a free agent, if he be found to do any act, it must be supposed to be with his will, unless it be . . . found to be against his will."[3]

(4.) And then, apart from all this, if we assume that judges may decline to apply rules of presumption (properly so called) to a special verdict in such a way as to discern in the verdict something which the jury have not in terms found, — consider why

[1] Rowe *v.* Huntington, Vaughan, p. 75.

[2] Kelyng (old ed.), p. 112.

[3] See Lord Blackburn's intimations as to a needless technicality in dealing with special verdicts, in Dublin R'y Co. *v.* Slattery, 3 App. Cas., at pp. 1204-5.

they may do it, and what it is that this really means. It may be done because the judges press their own rights and the jury's duty to a pedantic extreme. It is to be supported, if at all, on the ground that the judges recognize the independence of the jury in finding facts, and their own limited power of enforcing judicial rules. As regards the expressed will of the Legislature, they openly enforce it upon the jury by setting aside verdicts, or refusing to give effect to them. But as touching their own subsidiary legislation, they do not always claim the like full power, and they may justly proceed with reserve in enforcing it upon the jury. The administration of the law should, indeed, be consistent; and therefore what is adopted as a rule by the judges in deciding questions of fact should also govern the jury. But the court must not trench upon the jury's rights; and it is for this reason that they may sometimes abstain from coercing the jury into the adoption of *prima facie* rules of presumption. So that this abstention of the courts proves nothing at all as to the essential quality of these judicial rules,— whether they be in their nature substantive rules of law or not, but only that the judges are prudent, and that their power is limited.[1]

IV. I have been speaking of rules relating to specific facts or groups of facts. But sometimes the facts or the situation dealt with are not referable to any one branch of the law, but spread through several or through all of them. Then you have a general principle of legal reasoning. There are many such maxims, which pass current under the name of presumptions,— maxims, ground rules which must be remembered and applied in all legal discussion, such as those familiar precepts that *omnia praesumuntur rite esse acta, probatis extremis praesumuntur media*, and the like. And again, in all legal discussion, the existence of the usual qualities of human beings, such as sanity, is assumed, and their regular and proper conduct, and so honesty and conformity to duty.[2]

[1] Historically, the relations between the court and jury are a very pretty subject of study. The ingenious devices for protecting parties against the eccentricities of the jury are numberless. No one need expect to find any logical consistency in them. The "ultimate facts," in a special verdict, are merely all the facts which a jury has to find in any particular case to enable the court, upon recognized principles, to settle the case. These might be different in an action for malicious prosecution and an ordinary action of damages for negligence, upon the same question of reasonable conduct; because the judges have more power in the former action.

[2] De quolibet homine praesumitur quod sit bonus homo, donec probetur in contrarium. Bracton, fol. 193.

Many of these maxims and ground principles get perversely and inaccurately expressed in this form of a presumption, as when the rule that ignorance of the law excuses no one, is put in the form that every one is presumed to know the law;[1] and when the doctrine that every one is chargeable with the natural consequences of his conduct, is expressed in the form that every one is presumed to intend these consequences; and when the rule that he who holds the affirmative must make out his case, is put in the form of *praesumitur pro negante.* As to such statements, in whatever form they are made or ought to be made, their character is the same, that of general maxims in legal reasoning having no peculiar relation to the law of evidence.

V. If, now, it be asked, What particular effect have rules of presumption in applying the law of evidence? the answer seems to be that they have the same effect (and no other) which they have in all the other regions of legal reasoning. Their effect results necessarily from their characteristic quality. This quality imputes to certain facts or groups of fact a certain *prima facie* significance or operation. In the conduct, then, of an argument, or of evidence, they throw upon him against whom they operate the duty of meeting this imputation. Should nothing further be adduced, they settle the question involved in them in a certain way; he, therefore, who would not have it settled so, must show cause. This appears to be the whole effect of a presumption, and so of a rule of presumption. There are various rules of presumption which appear to do more than this, — to fix the amount of proof to be adduced, as well as the duty of adducing something. But the presumption, merely as such, goes no further than to call for proof of that which it negatives, *i.e.*, for something which renders it probable. It does not specify how much; whether proof beyond a reasonable doubt or by a preponderance of all the evidence, or by any other measure of proof. From the nature of the case, in negativing a given supposition and calling for argument or evidence in support of it, there is meant such an amount of evidence or reason as may render the view contended for rationally probable. But beyond that a presumption seems to say nothing. When, therefore, it is said that the contrary of any par-

[1] "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." Maule, J., in Martindale *v.* Falkner, 2 C. B. 719.

ticular presumption must be proved beyond a reasonable doubt, as is sometimes said, *e.g.*, of the "presumption of innocence" [1] and the presumption of legitimacy, it is to be recognized that we have something superadded to the rule of presumption, namely, another rule as to the amount of evidence which is needed to overcome the presumption; or, in other words, to start the case of the party who is silenced by it. And so, wherever any specific result is attributed to a presumption other than that of fixing the duty of going forward with proof. This last, and this alone, appears to be the effect of the presumption. It is the substantive criminal law and the substantive law as to persons that fix respectively the rule about the strength of conviction that must be produced in the mind of the tribunal in order to hold one guilty of crime, or to find a child born in wedlock to be illegitimate.[2]

This article is already long enough. I will not, therefore, go into the questions that are sometimes raised as to conflicting presumptions, and into the perplexing talk about presumptions of law and presumptions of fact. It may, perhaps, be gathered from what has been said that there seems to be nothing peculiar about conflicting presumptions. Rules of law often conflict; and so do logical inferences. As regards *rules* of presumption, — all of them are rules of law, and it seems to make no difference, as regards the subject of evidence or legal reasoning generally, whether they be called by one name or another, law or fact; the effect is the same, — that which has been pointed out. In dealing with the subject of evidence it is expedient to avoid the use of these terms, presumption of law and presumption of fact, for they do not help the discussion, and they are worse than useless, from their ambiguity.[3] The mere judicial recognition of a probability or a logical inference is often called a presumption; but in such cases there is no assertion of any rule.

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[1] Steph. Dig. Ev., art. 94. "Presumption of innocence. If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt."

[2] See a note in Chamberlayne's edition of Best on Evidence, s. 296, in which my friend, the editor, has here and there, by permission, done me the honor of a quotation.

[3] See, *e.g.*, the hopeless confusion of Best, Evid., ss. 321–327.